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No. 579

In the Supreme Court of the United States

OCTOBER TERM, 1951

INTERSTATE COMMERCE COMMISSION, ET AL., APPELLANTS

v.

JAMES MCWILLIAMS BLUE LINE, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT AS TO JURISDICTION.

In the United States District Court
Southern District of New York

Civil No. 65-270

JAMES McWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., and THE UNITED ILLUMINATING COMPANY, PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the Interstate Commerce Commission and railroads, signatories hereto, intervening defendants, submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause.

OPINION BELOW

The opinion of the District Court for the Southern District of New York is reported at 100 F.Supp. 66. A copy of the opinion and judgment are attached hereto as Appendix A.

JURISDICTION

The judgment of the District Court was entered on November 9, 1951. A petition for appeal is presented to the District Court herewith, to wit, on January 8, 1952.

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Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). *United States* v. *Capital Transit Co.*, 338 U.S. 286 (1949).

QUESTION PRESENTED

Whether the Interstate Commerce Commission exceeded its statutory authority in holding that the proportional rates assailed herein do not contravene Section 2 of the Interstate Commerce Act.*

STATUTES INVOLVED

Sections 2, 15(a), and 303(b) of the Interstate Commerce Act and the Declaration of National Transportation Policy are set forth in Appendix B hereto.

STATEMENT

Appellees are two coal dealers who own tidewater docks at New Haven, Conn., two consumers of coal at New Haven and Hartford, and a barge line which hauls coal from New Haven to Hartford. These parties filed a complaint with the Commission, alleging that the rates of the Pocahontas lines ** applicable to the transportation of bituminous coal from the southern Appalachian coal fields to the Port of Hampton Roads, Va., for transshipment by ocean-going vessels to ports in New England, such as New Haven, and thence by barge to interior destinations, such as Hartford, violate Sections 1, 2, and 3 of the Interstate Commerce Act. The Commission dismissed the complaint. The District Court set aside the Commission's order, holding that the

* All points raised in the Assignment of Errors are also presented. The Question Presented stated above sets forth the major issue.

** Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, and The Virginian Railway Company.

assailed rates violated Section 2 of the Act and contravened the decision of the Supreme Court in *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567 (1947).

At the outset, it is imperative that the rate structure which the District Court has declared to be unlawful be clearly understood. Railroads hauling bituminous coal from the Appalachian coal fields, both the northern, centering around southwestern Pennsylvania, and the southern, centering around southern West Virginia, maintain both local and proportional rates to the North Atlantic Ports of Hampton Roads, Baltimore, Philadelphia, and New York.* The following table, taken from the Commission's opinion in this case, is illustrative of the applicable rates from the base origin groups:

To	Distance Miles	Local rates	Proportional rates (1)	(2a)	(2b)
Hampton Roads, Va.	412	$3.98	$3.62	$3.42	$2.97
Baltimore, Md.	241	3.61	3.36	3.15	2.70
Philadelphia, Pa.	315	3.61	3.36	3.22	2.77
New York, N.Y. (upper piers)	388	3.99	3.62	3.62	3.17
New York, N.Y. (lower piers)	379	3.99	3.57	3.57	3.12

Proportional rates (1) to Hampton Roads, Baltimore, and Philadelphia, known as the "inside-the-capes" rates, apply on coal which is destined for delivery by water within the harbor limits, i.e., inside the

* Local rates apply to traffic which has not had a prior and will not have a subsequent movement. Proportional rates apply only when the transportation to which they relate is part of a through movement. In essence, proportional rates are balances of through rates and vary according to the length of the through service.

Virginia or Delaware capes. To New York the proportional rates are the same whether the destination of the coal is beyond or within the harbor limits. These rates are 24 or 25 cents less than the rates to the port locally, or in the case of New York, rates to the so-called upper piers are 37 cents less than the rates to New York locally. The reason for these rates is to enable receivers of coal located on the water front to obtain their fuel at about the same cost as those who have track-delivery facilities and to enable carriers not directly serving certain water front customers to compete with other carriers which serve such consumers by rail. In short, the railroads have reduced their rates to the ports by an amount sufficient to enable a purchaser of coal for delivery by barge to pay the barge charges within the port area and still be on a competitive basis with industries which receive coal in railroad cars.

Proportional rates (2a), known as "outside-the-capes" rates, apply on coal which moves beyond the respective harbor limits via ocean-going vessels or barges. These rates are from 39 to 46 cents less than the local rates to the ports, or in the case of New York, the rates to the so-called lower piers are 42 cents less than the rates to New York locally. The reason for these proportional rates is to permit coal which moves via rail and ocean routes to compete with coal which moves all-rail to the same destination, such as Philadelphia, New York, and points in New England.

The "inside-the-capes" and "outside-the-capes" rates have been in effect for about half a century. They have been sustained by the Commission under Section 2 of the Interstate Commerce Act. *Central Pennsylvania Coal Producers' Association* v. *B. & O. R. Co.,* 196 I.C.C. 203 (1933).

Proportional rates (2b) are of more recent origin, though they have been in effect for nearly 15 years. These rates, which apply on coal which moves via a rail-ocean-rail route to interior destinations in New England, had their genesis in the several proceedings which the railroads have instituted before the Interstate Commerce Commission since 1937 for authority to make general increases in their freight rates. The proceedings which are pertinent here were designated by the Commission as Ex Parte Nos. 115, 162, and 166 (hereinafter sometimes called "the revenue cases"). Proportional rates (2b) are a result of the so-called "single increase rule," which the Interstate Commerce Commission adopted in the revenue cases, and it should be clearly understood what that rule is, why it was adopted, and how it works.

THE REVENUE CASES

In the revenue cases the Commission undertook to distribute the burden of increased costs of rail transportation equitably among shippers of different commodities. At the insistence of shippers and the railroads, the Commission also gave recognition to the fact that in many instances rate and competitive relationships between various localities and commodities were important, and in some instances more important than the level of rates. In authorizing general rate increases, therefore, the Commission undertook to preserve existing rate relationships.

Rail rates on coal are generally established on a group and differential, rather than a distance, basis, and rate relationships between the various producing origins are of vital importance to the coal industry.

Consequently, in prescribing or approving increases in the rates on coal in the revenue cases, the Commission used percentages, or graded increases, subject to maxima, or hold downs. The object of this method of increase was to avoid disruption of existing rate relationships.

New England is one of the most important markets for coal mined in the southern and northern Appalachian fields. Coal moves to this market via all-rail and rail-and-water routes from both producing regions. Thus, there is competition not only between southern and northern coals in the New England market but also between all-rail and rail-and-water routes. The principal competition, however, is between northern coal moving to New England either all-rail or rail-and-water through New York Harbor and southern coal moving rail-and-water through Hampton Roads.

In prescribing or approving general increases in coal rates, the Commission had no difficulty in preserving the rate relationships between all-rail and rail-and-water routes where the coal was destined to a New England port city: it simply permitted the railroads to increase their rates by 90 cents per gross ton in the revenue cases.

Thus on coal moving to, say, New Haven

(1) via all-rail routes from the northern or southern coal fields, the base rates were increased by 90 cents per gross ton, and

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(2) via rail-and-water routes from the northern or southern fields, the base rail rates were increased by 90 cents. The water leg of these routes is either by private carrier or is exempt transportation under Section 303(b) of the Interstate Commerce Act, and the Com-

mission has no authority to prescribe or regulate rates of the water carriers.

THE REASON FOR THE SINGLE INCREASE RULE

The Commission faced a different problem, however, where coal, which had previously moved via a rail-and-water route to a New England port, say, New Haven, subsequently moved from that port via rail to an interior destination in New England, say, Hartford. Here both the railroads handling the coal from the coal fields to a tidewater port and the New Haven Railroad, which hauled the coal from New Haven to Hartford, had justified an increase in their rates. Their respective hauls were separated by private carriage or, in some instances, by contract or common carriage, which was, however, *always* exempt from regulation by the Commission under Section 303(b). If the Commission had permitted each of these railroads to increase its rates by the prescribed or approved percentages, shippers using the rail-and-water routes would have paid a double increase in rail rates on coal as compared with shippers using all-rail routes. This would have given the all-rail routes a competitive advantage over the rail-and-water routes.

To meet this situation the Commission evolved the so-called single increase rule, whereby the increase in rail rates on coal moving rail-ocean-rail from the coal fields to inland destinations in New England was limited to a total of 90 cents. This preserved the rate relationship between all-rail and rail-ocean-rail coal moving to Hartford and other New England destinations. Thus:

(1) the all-rail rates from the northern and southern fields to Hartford were increased by 90 cents per gross ton, and

(2) increases totaling 90 cents per gross ton were permitted in the total of the rail rates from the northern and southern fields to the tidewater ports and the rail rate from New Haven to Hartford.

The single increase rule likewise preserved the existing relationships between rates on coal moving rail-ocean-rail and rail-ocean-barge to Hartford. The total rail rates were increased by the same amount when the coal moved rail-ocean-rail as when it moved rail-ocean-barge to Hartford. A barge line handling coal between New Haven and Hartford was not hurt in any way by the increase in rail rates. It was no worse off than it would have been if the rail rates had not been increased at all.

In short, the single increase rule represents *reductions* in the normal pattern of general increases in rail rates to preserve rate relationships, prevent shippers by rail-water-rail routes from paying double increases, and permit the water carriers to continue to participate in the movement of coal without being hurt in any way by the rail rate increases.

The only alternatives to the single increase rule would have been:

(1) to permit the railroads to increase their charges on both rail legs of the rail-ocean-rail movement by the full percentage increases. This would have imposed on shippers via rail-ocean-rail routes double increases as compared with shippers via all-rail, rail-ocean, and rail-ocean-barge routes. As the result, railroads hauling coal to North Atlantic ports for transshipment by rail-ocean-rail routes would have had to reduce their proportional rates or run the risk of losing coal traffic moving via such routes.

(2) to permit the railroads involved on each rail leg of the rail-ocean-rail movement to take only one-half of the increases authorized on coal generally. This would mean that the railroads hauling coal to a port would have increased their rates on all transshipped coal by only 45 cents per ton, regardless of whether it moved rail-ocean-rail, rail-ocean, or rail-ocean-barge beyond the port. Since only about four percent of the coal moving under transshipment rates through the North Atlantic ports in 1948 had a further rail movement in New England, the railroads would have lost 45 cents per ton, which they urgently needed, on the bulk of their transshipped coal. In 1948, for instance, the revenue loss to railroads on coal moving for transshipment to North Atlantic and Lake Erie ports, to which similar proportional rates are in effect, would have been about $40,000,000. Moreover, the rates on coal for delivery via rail throughout the New England and Middle Atlantic states are related to the railroads' transshipment rates. A reduction in the transshipment rates might have compelled the railroads to reduce their all-rail rates to this territory. Among the important areas affected would have been that which includes Bethlehem, Syracuse, Eastern Pennsylvania, and parts of New Jersey, to which area about 75 million tons of coal moves every year.

In short, the end result of both these alternatives would have been upsetting established relationships and setting in motion competitive pressures which, at best, would have drained off increases in revenues which the Commission had found were urgently needed by the railroads. The only practical way the Commission could fulfill its responsibilities to the railroads under the Declaration of National Transportation Policy and Section 15a of the Act was to adopt the single increase rule.

THE MECHANICS OF THE SINGLE INCREASE RULE

To comply with the single increase rule, the railroads, with the approval of the Commission, adopted a so-called "refund arrangement." Under this plan the railroads transporting coal from the mines to the tidewater ports for transshipment collected the full measure of the increases, or 90 cents per gross ton. If subsequently the coal moved via rail from a tidewater dock in New England, the New England railroads collected from the shipper one-half of the maximum authorized increases, or 45 cents per gross ton. At this point, the shipper would have paid 45 cents per gross ton more than the increases authorized by the Commission. This 45 cents per ton was "refunded" to him upon his certifying to the railroads moving the coal from the mines to the tidewater port that the coal had subsequently moved from a New England port via rail, and that he had consequently paid increases in rail rates in excess of the maximum amounts authorized by the Commission. Obviously, when the coal moved from a tidewater dock in New England via barge or truck the shipper could make no such certification.

Refund arrangements similar to this are not uncommon. One was involved in *Barringer* v. *U.S.*, 319 U.S. 1 (1943).

THE QUESTIONS ARE SUBSTANTIAL

The issues involved in this appeal are of immense importance to the railroad industry and to the administration of the Interstate Commerce Act.

1. ***The MECHLING case should not be extended to strike down the proportional rates involved here. If so extended, it will distort the purpose of Section 2 and***

cast serious doubts on the validity of a large number of proportional rates.

Section 2 of the Act makes it unlawful for a railroad to charge one person more than another for a "like and contemporaneous service in the transportation of a *like* kind of traffic under substantially similar circumstances and conditions." The District Court held that the Commission exceeded its statutory authority in concluding that the assailed rates do not violate that section. It thought that this conclusion was required by *I.C.C.* v. *Mechling*, 330 U.S. 567 (1946). In that case the Commission had fixed a rate for transportation of wheat east by rail from Chicago at a rate higher if it arrived in Chicago by barge than if by rail or lake. It was conceded that the barge lines were "connecting lines," as were the rail and lake carriers, within the meaning of Section 3(4) of the Act, and the Supreme Court held that the application of different proportional rates to connecting lines violated Sections 3(4) and 2 and the Declaration of Policy of the Act. This case came before the District Court, however, on findings by the Commission that the Blue Line is not a connecting line within the meaning of Section 3(4).

The Commission also found that all the Blue Line's transportation of coal between New Haven and other destinations in New England is always beyond the jurisdiction of the Commission under Section 303(b) of the Act. In MECHLING some of the transportation performed by the barge lines was subject to the Commission's jurisdiction, and the Commission found that it was impracticable for the barge lines to maintain different rates on exempt and nonexempt transportation.* In short, in MECHLING there were barge

* In MECHLING the Commission found: "The Federal Barge Line serving Kansas City and the Mechling Barge Line serving the

routes and rates over which the Commission, as a practical matter, had full control. Here the Commission has no more control over any part of the Blue Line's operations out of New Haven than it would have if the Blue Line conducted a collateral operation up the Yangtze River.

The Declaration of National Transportation Policy requires the Commission to provide for fair and impartial regulation of "all modes of transportation" subject to the Act, so administered as to "preserve the inherent advantages of each." The words are "modes of transportation" subject to the Act, not "carriers subject to the Act." The "mode of transportation" involved in this case, i.e., bulk transportation not subject to regulation by the Commission, is not a "mode of transportation" subject to the Act. Moreover, the Declaration imposes upon the Commission duties to railroads as well as water carriers. In the revenue cases the Commission was faced with the immediate and serious problem of providing, as it is required to do by Section 15(a) of the Act, adequate earnings for railroads which are subject to its regulation. Obviously, it would have been handicapped in performing those duties and will be handicapped in the future in performing similar duties, if it is required to look out for the welfare of a mode of water transportation which it is powerless to regulate to the extent of permitting unregulated barge lines to participate in increases in rail rates.

The District Court not only brushed aside these differences as immaterial, but also disregarded the sub-

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Illinois origins are common carriers, and their port-to-port rates are on file with us. Such rates are subject to our jurisdiction, except those of Mechling in instances where not more than three kinds of grain are transported in a given tow. However, Mechling has found it impracticable to maintain different rates on the exempt and non-exempt traffic." (262 I.C.C. at 19)

stantially different economic backgrounds in the two cases. In MECHLING, there was a deliberate attempt to deprive the barge lines of participation in proportional rates which they had enjoyed since barges returned to the inland waterways in 1933. The admitted design of the railroads was to drive traffic off the barges and onto the rails. The Supreme Court viewed this as a scheme to deprive shippers of what it considered to be cheap water transportation. Here nothing has been done which hurts the Blue Line or shippers of coal over the Blue Line. They have been left in precisely the same position that they would have been in if the Commission had not authorized any general increases in the railroads' rates in the revenue cases. It is just as inviting for shippers to use rail-ocean-barge routes today as it was before the rail-ocean-rail proportional rates were put into effect.

Indeed, the Blue Line's complaint is not that it is in any worse position than it would have been in if the railroads had not increased their rates but that it has not been permitted to participate in the railroads' rate increases which the Commission authorized. The inequity of this complaint is obvious, because the Pocahontas lines have been able to increase their proportional rates by only 28% since 1936, whereas the Blue Line over that period has increased its rates for transporting coal from New Haven to Hartford by 87%.

What the District Court has done in this case is to strike down proportional rates which it regarded as discriminatory against water transportation without analyzing and giving weight to the compelling reasons which led the Commission to adopt the single increase rule and approve such proportional rates. To reach this result, the District Court extended Section 2 to a situation which it simply was not designed to cover.

Section 2 was enacted more than half a century before Congress enacted the Transportation Act of 1940, which gave the Commission authority to regulate water carriers. Section 2 is primarily directed to discrimination between shippers in the same locality. Its purpose is to put such shippers on an equal footing, so far as freight rates are concerned. While Section 2 must be construed in the light of the new policy made effective by the Transportation Act of 1940, it cannot be converted into a vehicle for striking down the proportional rates involved in this case without distorting its purpose and casting grave doubts on the validity of a large number of proportional rates which have been held to be valid under Section 2 and which are tightly woven into the fabric of the Nation's railroad rate structure.

It is common practice for the railroads to publish and maintain proportional rates, the application of which depends upon the origin or destination of traffic. For instance, more than 100 million tons of bituminous coal move annually on such rates. Grain moving from the West to the East moves on proportional rates which vary according to where the grain originates. Packing house products move to various eastern ports on proportional rates which vary depending upon whether such products are destined to points in the United Kingdom or Europe or to points in other foreign countries. To the Gulf ports class and commodity rates are published which differ in their application, depending upon whether the traffic is exported to destinations in Europe, South Africa, eastern ports of South America, or to ports of destination in other countries. The District Court's decision, which at least casts a cloud on the validity of these rates, deserves full hearing and briefing before the Supreme Court.

2. *The District Court's decision is based on an improper construction of Section 2 which deprives the Commission of its authority to determine what is "like and contemporaneous service," what is "like kind of transportation," and what circumstances and conditions are "substantially similar."*

The District Court quoted from other cases to the effect that Section 2 does not allow railroads to make a difference in rates because of differences in circumstances arising either before the services of the carrier began or after they were terminated. None of the cases from which those quotations are taken, however, outlaws proportional rates. The Interstate Commerce Act specifically refers to proportional rates. 49 U.S.C.A. Secs. 1(4), 6(1), 6(11)(b), 15(1). As this Court said in *I.C.C.* v. *Inland Waterways Corp.*, 319 U.S. 671, 684-85 (1943):

> "Proportional rates so differing and lower than local rates for like outbound transportation have a long history, antedating the Interstate Commerce Act itself. Long hauls have generally been thought entitled to move at a rate less than the sum of the rates for local or short hauls between intermediate points. The practice of routing commodities such as grain to centers for marketing and processing has been widespread and often a necessary feature of the process of distribution. In many instances stopovers for marketing and processing have not been considered as disrupting the continuity of transportation to more distant points, and consequently the grain has been allowed to move on at a rate lower than the outbound rate on grain originating locally and not from a distance. To get the outbound business competing carriers frequently would offer rates similarly computed. Proportional rates established on this reasoning have become deeply embedded in the transportation system of the country, and have

been approved by the Interstate Commerce Commission, by the federal courts, this one included; and, so far as it has spoken on the subject, by Congress itself. We see no reason for repudiating them now."

The late Commissioner Eastman has justified proportional rates on the grounds:

First, even though the shipments to which the two kinds of rates apply are the same in content, the dissimilarity in their origins or destinations and in commercial and competitive conditions prevents them from being a "like kind of traffic" within the meaning of Section 2.

Second, there is a fundamental dissimilarity in the attendant "circumstances and conditions" as between local traffic and traffic which is being transported part of the way from an origin or to a destination which lies beyond, and this dissimilarity is not extraneous to the transportation service rendered but is incident thereto.

See Commissioner Eastman dissenting in *Grain Proportionals, Ex-barge to Official Territory,* 248 I.C.C. 307, 317 (1941).

Once it is conceded that the railroads may take into account the origin or destination of traffic in fixing their rates the question arises as to what is the point of origin or destination *for that purpose.* It is clear, we submit, that in fixing proportional rates or rates in the nature of proportional rates, the railroads are not required by Section 2 to take into account all the transportation, including private transportation, involved in moving a product from the point of production to the point of ultimate consumption. The railroads are entitled to draw the line in a practical way and determine for themselves how much of the total transportation,

private or public, they will consider in fixing their own rates. There are, of course, limitations on this discretion of the railroads, but they are not limitations imposed by Section 2. They are limitations imposed by other provisions of the Act, such as the Declaration of Policy that the Act shall be so administered as to preserve the inherent advantages of all modes of transportation subject to the Act, and the requirement of Section 3(4) that railroads shall not discriminate in their rates, fares and charges between connecting lines.

An example taken from the handling of grain shipments will illustrate our point. Grain is shipped into transit points in cars loaded with, for instance, 120,000 pounds of grain. There it is unloaded, processed and shipped out partly by rail and partly by truck. The rail movement out of the transit point may be covered either by a carload rate with a minimum weight of, for instance, 60,000 pounds, or a less-than-carload rate. In fixing their charges, the railroads may and do treat that part of the carload which has a subsequent movement by rail as moving to the point of ultimate delivery, while at the same time, they may and do treat that part of the carload which moves out of the transit point by truck as having stopped at the transit point.

T. A. D. Jones purchases coal in carload lots at the southern coal fields, has it shipped to Hampton Roads, where it is loaded into colliers. These colliers carry approximately 10,000 tons of coal. When the colliers reach New Haven, they are unloaded onto T. A. D. Jones' tidewater dock. The bulk is broken. Some of the coal moves from the dock by rail, some by truck and some by barge. Only the subsequent rail movement is subject to regulation by the Commission. Appellants contend that they are entitled to treat all of the coal as stopping at New Haven except that part thereof

which has a further rail movement, and they may take into account such further rail movement in determining their proportional rates for the through movement.

3. *The District Court's decision deprives the Commission of its authority to look through form to substance and conclude that no different "rates" are charged on rail-ocean-barge and rail-ocean-rail traffic.*

It is well-established that the Commission may look through form to substance in determining whether there has been a violation of the Act. As the Supreme Court said in *Barringer & Co.* v. *U.S.*, 319 U.S. 1, 7, 8 (1943):

> "In considering the circumstances and conditions attending the transportation service, the Commission was not required to ignore the fact that the loading charges, although separately stated in the tariffs, are in each case a component part of the total line-haul cost to the shipper and inseparable from it.
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> * * * * *
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> "Whether made in the one charge or the other, it (the loading charge) enters into the total cost of the line haul to the shipper, regardless of whether the loading charge be separately stated or included in the line-haul tariff. Since the only effect on the shipper is in the difference in the line-haul charge and he is harmed no more by one method of effecting that difference than the other, any conditions attending the line haul which justify the one as nondiscriminatory equally justify the other."

Moreover, the Supreme Court stated in *Power Commission* v. *Hope Gas Company*, 320 U.S. 591, 602 (1944):

> "It is not the theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable,

> judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important."

In the case of a shipment of coal which moves rail-ocean-rail, there is every reason to make the refund which is made, because the shipper has paid a general increase of 45 cents more than the Commission has authorized. It is this overpayment which is refunded. But in a shipment by rail-ocean-barge there is no such overpayment. The shipper simply pays the single increase of 90 cents, the same amount which the other shipper has paid, after taking the refund into account, and there is, therefore, nothing to refund.

The Commission properly recognized that the refund arrangement in substance does not create different rates from the Pocahontas mines on rail-ocean-rail and rail-ocean-barge coal but effects a division of the general increases totaling 90 cents between the Pocahontas lines and New England railroads where the latter participate in the movement. The mechanics of the single increase rule should not obscure the fact that the rates of the Pocahontas lines under attack are in ultimate effect—both legal and economic—precisely the same for both rail-ocean-rail and rail-ocean-barge movements. If this be so, there can be no basis for the charge of discrimination or undue preference under any section of the Act.

In the revenue cases the Commission has consistently recognized the divisional nature of the single increase rule. It has permitted the railroads to increase their rates by the same amount whether or not one or two railroads were involved in the haul and whether or not a water movement precedes, separates, or follows two rail hauls. As a matter of fact, at one time the railroads, with the Commission's permission, put the single

increase rule into effect by a divisional rather than a refund arrangement. Thus, when coal moved over the Pocahontas lines and thence to a New England destination by ocean and rail movement the Pocahontas lines collected the full measure of the increase and divided the increase directly with the New England railroad involved.

The divisional nature of the refund arrangement is further indicated by the fact that in several of the revenue cases the entire increase was given over to the New England lines participating in the rail-ocean-rail movement, the Pocahontas lines and other railroads hauling coal from the coal fields to North Atlantic ports receiving nothing. Moreover, at present the New England lines get one-half of the 90-cent increase in rates, although their haul is only about 35 to 40 miles compared to a haul of over 400 miles from the southern coal mines to Hampton Roads. The long standing revenue difficulties of the New England lines were recognized in the *New England Divisions* case, 261 U.S. 184 (1923), where the validity of the Commission's order increasing the divisions or shares of the New England roads in through freight rates was upheld.

The decision of the District Court in setting aside the Commission's order deprived the Commission of its right— in fact, its duty—to look through form to substance and see in this case a division of increases in rail charges in a through movement of coal from the coal fields to interior destinations in New England, designed to take care of the proved revenue needs of the railroads without in any way upsetting existing relationships of rail and water routes. The District Court, however, failed to analyze the problem which confronted the Commission and thus decided the case on the basis of form rather than substance and upon what

was no more than a superficial resemblence to MECHLING.

4. *The District Court's decision is contrary to the BARRINGER case.*

In *Barringer & Co.* v. *U.S.*, 319 U.S. 1 (1943), the railroads carrying cotton from points in Oklahoma to points on the Gulf of Mexico published rates under which cotton was typically collected in less-than-carload quantities at ginning points, carried by rail for short distances to compressors, and after compressing, assembled in carload quantities for shipment to destination. The shipper paid the local, less-than-carload, rate to the compress point, and the local rate from the compress point to destination, but on the cotton's arrival at destination the carriers refunded the difference between the freight paid and the through, carload, rate from point of origin to destination. But in those instances where cotton moved to a compress point by rail and out of such point by truck, the carriers by their tariffs retained the less-than-carload rate to the compress point. In short, the railroads adjusted their rates to the compress points, depending upon the destination to which the cotton moved from the compress points and whether or not it moved by rail. If the rate structure involved in BARRINGER is lawful, the decision of the District Court in this case is necessarily wrong.

5. *None of the appellees was entitled to invoke Section 2 before the District Court.*

The Commission found that there were no parties subject to unjust discrimination under Section 2. The District Court said:

> "We do not accept the finding of the Commission that 'there are no parties subjected to unjust

discrimination or undue prejudice as the complaining and intervening operator-dealers forward coal and the complaining and intervening public utilities receive coal, by both rail and barge, and are accorded the same proportional rates and refunds.' Such a finding seems to us clearly erroneous and not supported by any substantial evidence.

"However, quite apart from this, we hold that the rates complained of are unlawful because in violation of Section 2 of the Interstate Commerce Act (49 U.S.C. 2)."

This last-quoted sentence is surprising, if it means—as it seems to mean—that a District Court can strike down an order of the Commission without finding that somebody is injured. If the sentence means that, it is obviously erroneous. District Courts have no power to correct discrimination "in the air."

Moreover, the District Court's conclusion that the Commission's finding is not supported by substantial evidence is not correct. Only shippers have standing to invoke Section 2. *Barringer & Co.* v. *U. S.*, 319 U.S. 1, 13 (1943); *Williams* v. *Terminal Co.*, 315 U.S. 386, 408 (1942). The only shippers involved in this case are T. A. D. Jones & Co. and Wyatt, Inc., coal dealers who operate tidewater docks at New Haven. Both ship coal by rail and barge to interior New England destinations, and the assailed proportional rates do not place either at a competitive disadvantage with the other or, so far as the record shows, with any other competitor or with any other coal dealer in New England. They have not pointed to any other shipper who can or does avail himself of any proportional rate which is not available to them.

Moreover, a difference in rates can be unjustly discriminatory only where it produces injury, and the evidence clearly shows that neither of these parties is

injured by the alleged difference in rates complained of. In fact, they benefit by the rail-ocean-rail proportionals and concede that they would be injured if such rates were cancelled.

The two customers of Jones or Wyatt mentioned in the record are United Illuminating Company and Hartford Electric Light Company. United Illuminating Company has a plant at New Haven. It is not equipped to receive coal by rail and receives coal solely by barge. Hartford Electric Light Company has facilities for receiving coal both by barge and by railroad car, but its capacity for receiving coal by railroad car is limited to 25 to 30% of its capacity. The record shows, however, that for the year 1948, the last year for which records were available at the time of the hearing, Hartford Electric had received and was receiving coal all-rail from the northern Appalachian coal fields to meet about 25% of its coal requirements. It received the rest by barge. There is no evidence that either Jones or Wyatt had ever delivered a single pound of coal to Hartford Electric by rail from New Haven.

So far as Jones and Wyatt are concerned, they have not shown that the proportional rates applicable to rail-ocean-rail shipments have been attractive enough to induce them to take a single pound of coal off the barges and put it onto the rails. The evidence indicates that whenever Jones and Wyatt can reach a customer by barge they do so despite the allegedly discriminatory proportional rates applicable to rail-ocean-rail coal. Therefore, as to points which can be served either by barge or rail, the rail-ocean-rail proportional rates are simply "paper" rates. Such "paper" rates cannot result in unjust discrimination.

In short, the District Court eliminated from consideration any section other than Section 2. There were

no parties before the Court who were entitled to invoke that section, and the Court's action in setting aside the Commission's order because of discrimination "in the air" is plainly erroneous.

The questions presented in this appeal are substantial, are obviously of public importance, and cannot be disposed of on an examination of the appeal papers. Probable jurisdiction should, therefore, be noted, and the cause set down for argument.

Respectfully submitted,

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January 8, 1952.

APPENDIX "A"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES MCWILLIAMS BLUE LINE, INC., T.A.D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., AND THE UNITED ILLUMINATING COMPANY, PLAINTIFFS,

against

THE UNITED STATES OF AMERICA, et al., DEFENDANTS.

Civil 65-270

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Of Counsel.

Before SWAN, Circuit Judge, and RYAN and SAMUEL H. KAUFMAN, District Judges.

RYAN, D. J.:

This suit is filed under Sections 1336, 1398, 2321, 2322 and 2323 of the United States Code, Title 28, which provide for suits to enjoin, set aside, annul and suspend orders of the Interstate Commerce Commission. It came on to be heard before a specially constituted court, pursuant to the provisions of Title 28, Sections 2284, and 2321-2326, U.S.C. The complaint prays judgment setting aside, and enjoining enforcement, of an

order of the Commission, entered June 5, 1950 [1], which, by a six-to-five vote of the Commission, dismissed the complaint in a proceeding before it, Docket No. 30122, *James McWilliams Blue Line, Inc. et al. v. Campbell's Creek Railroad Company, et al.*, 278 I.C.C. 312.

No material issue of fact has been raised by the pleadings.

We find that this Court has jurisdiction of the subject matter of this suit, that the amount in controversy exceeds the sum of $3,000 exclusive of interest and costs, and that venue is properly laid because plaintiff "Blue Line" has its principal office within this district. 28 U.S.C. 1398.

The complaint before the Commission assailed rates and practices affecting the transportation of rail-ocean-barge coal, by the so-called Pocahontas [2] Railroads from mines in Virginia, West Virginia and Kentucky to Hampton Roads ports, which coal is subsequently moved by ocean to New England ports and thence by barge to interior ports. The rates, which are proportional rates, are 45 cents per ton higher than proportional rates on like coal which is moved by ocean to New England ports, and thence by rail (rail-ocean-rail coal).

In the proceeding before the Commission, the com-

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[1] The order of the Commission was issued on June 5, 1950; however, by a second order of January 8, 1951, the Commission denied the plaintiffs' petition for reconsideration and reargument.

[2] The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, and The Virginia Railway Company.

In addition to these three "Pocahontas" lines, because they participate in transporting coal from various mines, the following were named as defendants before the Commission: Campbell's Creek Railroad Company, The Kanawka Central Railway Company, Kanawka Glen Jean and Eastern Railroad Company, Kelly's Creek and North Western Railroad Company, Kelly's Creek Railroad Company, The New York Central Railroad Company and Winifrede Railroad Company.

plainants (plaintiffs herein) contended that the rates so established are unlawful and in violation of the provisions of Sections 2, 3(1) and 3(4) of the Interstate Commerce Act [3], particularly when read in light of the National Transportation Policy as set forth in the Transportation Act of 1940, which amended the Interstate Commerce Act (49 U.S.C. notes preceding Sections 1, 301, 901 and 1001). [4]

We have concluded that the order of the Commission dismissing the complaint filed before it by the plaintiffs herein was erroneous, that the rates complained of are discriminatory and unlawful, and that the continued

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[3] Section 2 (49 U.S.C. 2) declares it is unlawful to charge one person more than another for a "like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions."

Section 3(1) (49 U.S.C. 3(1)) declares unlawful "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever" or to subject any of the above "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section 3(4) (49 U.S.C. 3(4)) provides that rail carriers "shall not discriminate in their rates, fares, and charges between connecting lines * * *. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to Part III."

[4] The National Transportation Policy is set forth in the Transportation Act of 1940, which amended the Interstate Commerce Act (49 U.S.C. notes preceding Sections 1, 301, 901 and 1001); that policy expresses the Congressional mandate that "All of the provisions of this Act shall be administered and enforced with a view to carrying out" the policy there expressed. The policy goes on to state that it is the will of Congress "to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; * * * to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices."

establishment and enforcement of those rates must be enjoined.

Plaintiff, James McWilliams Blue Line, Inc. ("Blue Line") is a New Jersey corporation, with its principal office at No. 1 Broadway, New York, N. Y. "Blue Line" is a common carrier by water in interstate commerce; it holds a certificate of convenience and necessity, issued to it by the Commission pursuant to Section 309 of the Interstate Commerce Act (49 U.S.C. 909), to engage, subject to said Act, as a common carrier by water in the interstate transportation of commodities generally by water. "Blue Line" is in competition with the New York, New Haven and Hartford Railroad for the movement of coal from New Haven to ultimate destinations in New England.

Plaintiffs T. A. D. Jones & Co., Inc., and Wyatt, Inc., are Connecticut corporations with their principal offices at New Haven, Connecticut. They are engaged in buying and selling coal; each has at New Haven yards, docks and facilities which enable it to receive and transship coal for transportation to points beyond either by water or by rail. Both sell and ship coal to customers throughout New England; included among their customers are plaintiffs, the Hartford Electric Light Co. and United Illuminating Company, public service utility companies of Connecticut, which in their production and sale of electric energy use large quantities of coal.

United States of America, named as defendant, joins in the prayer of the plaintiffs and asks that the relief sought in the complaint be granted.

The Pocahontas railroads and a group of northern railroads were, on their petitions, granted permission

to intervene in this suit.[5] The answers of the railroads, while putting in issue no material allegation of the complaint, do assert the legality of the assailed rates and ask for a dismissal of the complaint.

The controversy before us had its genesis in petitions filed by the railroads with the Commission at various times since 1937 asking for authority to make general increases in their freight rates.[6] As an outgrowth of these ex parte proceedings, the Commission adopted and applied the "single increase rule" and used percentages, or graded increases, subject to maxima, or hold-downs. The Commission permitted the railroads to increase their rates by 90 cents per gross ton on coal destined for routing through a New England port city, and irrespective of whether the coal moved via a rail-ocean-rail route or via a rail-ocean-barge route. Such an increase would, of course, apply to coal moving through New Haven to a point of ultimate destination

[5] The Northern railroads were also granted permission to intervene in the proceedings before the Commission. They are:

The Baltimore and Ohio Railroad Company, Boston and Maine Railroad, The Central Railroad Company of New Jersey, Central Railroad Company of Pennsylvania, The Delaware and Hudson Railroad Corporation, The Delaware, Lackawanna and Western Railroad Company, Erie Railroad Company, Lehigh and New England Railroad Company, Lehigh Valley Railroad Company, Maine Central Railroad Company, The Monongahela Railway Company, Montour Railroad Company, the New York, New Haven and Hartford Railroad Company, New York, Ontario and Western Railway Company, New York, Susquehanna & Western Railroad Company, The Pennsylvania Railroad Company, The Pittsburgh & Shawmut Railroad Company, The Pittsburgh and Lake Erie Railroad Company, Reading Company, Western Maryland Railway Company.

[6] The proceedings which are pertinent here were designated by the Commission as Ex Parte 115. (General Commodity Rate Increases, 1927, 223 I.C.C. 657, 229 I.C.C. 435), No. 162 (Increased Railway Rates, Fares, and Charges, 1946, 266 I.C.C. 537; 268 I.C.C. 169; 269 I.C.C. 418; 269 I.C.C. 418; 273 I.C.C. 445; 274 I.C.C. 168; and No. 163 (Increased Freight Rates, 1947, 269 I.C.C. 33; 270 I.C.C. 81, 270 I.C.C. 93; 270 I.C.C. 403).

in New England from either the northern or southern coal fields. In application, the increase granted was restricted to, and divided among, the railroads involved. The factual situation which resulted is shown by taking the rate of $3.42 per gross ton, which, at the time of the complaint, was published by the Pocahontas railroads as their initial charge for transporting coal from certain mines to the Hampton Roads ports. This rate was collected in the first instance by the Pocahontas roads on all coal transported to Hampton Roads and destined to New Haven. The tariffs provided, however, that if the coal was subsequently moved by railroad from a New England port to the point of ultimate destination, the Pocahontas roads, upon receipt of certification to that effect, would refund 45 cents per ton, leaving them a net charge for their transportation from mines to Hampton Roads of $2.97 per ton. No refund is provided, however, if the coal was subsequently moved from a New England port to the same destination by water carrier. There was created a differential in charges for the rail transportation service from the mines to Hampton Roads ports dependent not upon any difference in rail service, but solely upon the method of subsequent movement to ultimate destination.

Before the Commission, the Pocahontas railroads conceded that it does not cost them any more to transport coal from the mines to Hampton Roads when such coal reaches its final destination in New England by barge than when it reaches its final destination by rail. The services they furnish to shippers are the same in each instance.

A large part of the coal dealt in by Jones & Co. and Wyatt, and purchased and used by Hartford Electric and United Illuminating, consists of bituminous coal originating at mines in the Pocahontas District. This

coal is transported by the Pocahontas railroads by rail from the mines to the Hampton Roads ports. Thence, it is carried by ocean carriers to the New Haven docks of Jones & Co. and of Wyatt, from whence it is transshipped for movement to points of ultimate delivery in New England. The receipt and further shipment of coal by them by water is cheaper and more economical than by rail, and they have established facilities representing substantial investments designed to handle coal by water.

We do not accept the finding of the Commission that "there are no parties subjected to unjust discrimination or undue prejudice as the complaining and intervening operator-dealers forward coal and the complaining and intervening public utilities receive coal, by both rail and barge, and are accorded the same proportional rates and refunds." [7] Such a finding seems to us clearly erroneous and not supported by any substantial evidence.[8]

However, quite apart from this, we hold that the rates complained of are unlawful because in violation of Section 2 of the Interstate Commerce Act (49 U.S.C. 2). We find it unnecessary, therefore, to determine the legality of these rates under Sections 3(1) and 3(4) of the Act.

We are unable to distinguish the instant case from *I.C.C.* v. *Mechling,* (1946), 330 U.S. 567. There the order of the Commission permitted the railroads to charge higher reshipment rates (3 cents per 100 lbs.) east from Chicago for grain brought to Chicago by barge than for ex-lake or ex-rail grain. The enforce-

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[7] Report of Commission, June 5, 1950, Sheet 10.

[8] *cf. Universal Camera Corp.* v. *Labor Bd.*, 340 U.S. 474, *N.L.R.B.* v. *Universal Camera Corporation*, C.A. 2d Cir., Docket No. 21395, decided July 13, 1951.

ment of the order was enjoined to the extent that it permitted this extra charge.

The only factual difference between the *Mechling* case and the case at bar is that in the *Mechling* case the rates charged for rail transportation were dependent upon the means used to accomplish the prior movement of the shipment, while here the rates are made dependent upon the means used to accomplish the subsequent movement of the shipment. This difference is of no moment. It has been settled with respect to the provisions of Section 2 of the Act prohibiting different charges by a common carrier for "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" that "* * * the clause did not allow carriers by railroad to make a difference in rates because of differences in circumstances arising either before the service of the carrier began or after it was terminated."[9]

In *Wight* v. *United States* (1896), 167 U.S. 512, Mr. Justice Brewer wrote of this section:

> "The wrong prohibited by the section is a discrimination between shippers. It was designed to compel every carrier to give equal rights to all shippers over its own road and to forbid it by any device to enforce higher charges against one than another." (p. 517)

And further that:

> "It was the purpose of the section to enforce equality between shippers, and it prohibits any

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[9] *Interstate Commerce Com.* v. *Delaware, L. & W. R. Co.* (1910), 220 U.S. 235, 253-254.

> rebate or other device by which two shippers, shiping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefor." (p. 518)

Nor are we impressed by the attempt of the Commission to distinguish this case from the *Mechling* case because the Commission cannot regulate "Blue Line's" barge rates. That was true, at least as to part of the ex-barge grain in the *Mechling* case; however, as we read the *Mechling* case, the decision was not based upon the existence of jurisdiction in the Commission to regulate the barge rates on the grain traffic and was reached quite independently of such jurisdiction.

Of the objection, that dire consequences will follow a reversal of the Commission's order and the consequent disruption of the rate structure, we note that of a similar contention made by the Commission in the *Mechling* case, it was said that

> "The possibility of such a disruption does not remotely justify discriminations against barge traffic which actually deprive shippers and the barge companies of the inherent advantages of water transportation guaranteed to them by Congress. See United States v. Chicago, M. & St. P.R. Co., 294 U.S. 499, 506-510." (I.C.C. v. Mechling, supra, p. 580)

The relief prayed for by the plaintiffs must be granted and a judgment may be submitted on notice providing that the order of the Commission of June 5, 1950, dismissing the complaint before it be vacated and set aside, directing the Commission to make and enter an appropriate order ending the practice complained

of and enjoining the Commission from further continuing and enforcing the practices and rates now in effect.

THOMAS W. SWAN
SYLVESTER J. RYAN
SAMUEL H. KAUFMAN

September 24th, 1951.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
ORDER AND JUDGMENT

Civil 65-270

JAMES MCWILLIAMS BLUE LINE, INC., T. A. D. JONES & CO., INC., WYATT, INC., THE HARTFORD ELECTRIC LIGHT CO., AND THE UNITED ILLUMINATING COMPANY, PLAINTIFFS,

against

THE UNITED STATES OF AMERICA, et al., DEFENDANTS.

This cause having been duly and properly submitted and a court of three judges consisting of the undersigned having been duly convened pursuant to the provisions of Title 28, United States Code, Section 2284, to hear this cause, and this cause having on due notice come on for hearing before this court upon the complaint of the plaintiffs and the answers of the defendants, and the evidence before the Interstate Commerce Commission having been submitted to and considered by this court, and counsel for the parties having been heard on oral argument and brief, and the cause then having been taken under advisement by this court, and this court having concluded, found and determined, for the reasons set forth in the opinion filed by it herein on September 24, 1951, that the order of the Interstate Commerce Commission made and entered on June 5, 1950, in its Docket No. 30122, *James McWilliams Blue Line, Inc., et al.* v. *Campbell's Creek R. R. Co., et al.*, should be vacated and set aside; and that said Commission be directed to make and enter an appropriate order ending the practice complained of, and that the Commission should be enjoined from further continu-

ing and enforcing the practices and rates now in effect, it is

ORDERED, ADJUDGED AND DECREED

1. That the order of the Interstate Commerce Commission dated June 5, 1950 in the proceeding before the Commission on the complaint of James McWilliams Blue Line, Inc., and others, Docket No. 30122 on the Commission's Docket, said proceeding being entitled James McWilliams Blue Line, Inc., et al. v. Campbell's Creek Railroad Company, et al., dismissing the complaint be and it is hereby vacated and set aside.

2. That the Interstate Commerce Commission shall make and enter an appropriate order which shall order the railroads, defendants in said proceeding, to cease and desist from continuing the practices and rates found by the Court in its decision herein to be in violation of Section 2 of the Interstate Commerce Act.

3. That the Interstate Commerce Commission be and is hereby enjoined from further continuing and enforcing the practices and rates found by the Court in its decision herein to be in violation of Section 2 of the Interstate Commerce Act.

This 8th day of November, 1951.

THOMAS W. SWAN
United States Circuit Judge
SYLVESTER J. RYAN
United States District Judge
SAMUEL H. KAUFMAN
United States District Judge

Judgment entered:
William V. Connell
Clerk
November 9, 1951.

APPENDIX "B"

The pertinent provisions of the Interstate Commerce Act are as follows:

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy. (Section 1, Act of September 18, 1940, c. 722, 54 Stat. 898, 899; 49 U.S.C., notes preceding Sections 1, 301 and 901.)

Section 2 of Part I of the Interstate Commerce Act:

Sec. 2. That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or prop-

erty, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U.S.C. 2)

Section 15a of Part I of the Interstate Commerce Act:

(1) When used in this section, the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U.S.C. 15a)

Section 303(b) of Part III of the Interstate Commerce Act:

(b) Nothing in this chapter shall apply to the transportation by a water carrier of commodities in bulk when the cargo space of the vessel in which such commodities are transported is being used for the carrying of not more than three such commodities. This subsection shall apply only in the case of commodities in bulk which are (in accordance with the existing custom of the trade in the handling and transportation of such commodities as of June 1, 1939) loaded and carried without wrappers or containers and received and delivered by the carrier without transportation mark or count.

For the purposes of this subsection two or more vessels while navigated as a unit shall be considered to be a single vessel. This subsection shall not apply to transportation subject, at the time this chapter takes effect, to the provisions of sections 843-848 of Title 46. (49 U.S.C. 903(b))

Service of the foregoing statement as to jurisdiction and receipt of copy thereof are hereby acknowledged this 8th day of January, 1952.

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CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 579

INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

JAMES McWILLIAMS BLUE LINE, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM AND STATEMENT OPPOSING JURISDICTION

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ROBERT W. KNOX,
Counsel for Appellees.

LORD, DAY & LORD,
KNOX, MATTHEWS & LISHMAN,
Of Counsel.

INDEX

Subject Index

	Page
Motion to affirm	1
Statement	1
The facts	3
The grounds for the motion to affirm	6
Argument	7
The decision of the lower court was correct, and required by the decisions of this Court in the Mechling Case and earlier cases. The appeal presents no new or substantial questions. Therefore the judgment below should be affirmed	7
Point I—Whether or not the rates for the transportation of coal from mines to the Hampton Road Ports are properly described as "proportional rates", the decision of the Court below involved neither extension of the Mechling Case nor distortion of the purpose of Section 2 of the Interstate Commerce Act. Neither was it based upon a construction of Section 2 which deprived the Commission of authority thereunder. Indeed the decision below was entirely in conformity with the rulings of the Court and the established interpretation of the Act hence no new or substantial issue is raised by the appeal	9
Point II—Apart from the decision in the Mechling Case, the decision of the Court below was in accordance with earlier decisions of this Court interpreting and giving effect to the Interstate Commerce Act	19
Point III—The appellants' contention that the District Court's decision is contrary to the decision in the Barringer Case is without merit	21

Page

Point IV—Appellants' contention that none of the appellees was entitled to invoke Section 2 and that the District Court erred in finding to the contrary is also without substance 22

Appendix—Pertinent provisions of the Interstate Commerce Act 27

Statement opposing jurisdiction 28

Table of Cases Cited

A.T. & S.F. Ry. v. *U.S.*, 279 U.S. 768 13

Atlantic Coast Line v. *U.S.*, 284 U.S. 288 15

Barringer v. *U.S.*, 319 U.S. 1 21

Chattanooga Packet Co. v. *I.C. R.R. Co.*, 33 I.C.C. 384 12

Chicago, I. & L. Ry. v. *U.S.*, 270 U.S. 287 15

Chicago and Wisconsin Points Proportional Rates, 17 M.C.C. 573 24

Douglas & Co. v. *Illinois Central R.R. Co.*, 31 I.C.C. 587 24

Interstate Commerce Commission v. *Delaware, L. & W. R.R.*, 220 U.S. 235 ..... 11, 15

Interstate Commerce Commission v. *Inland Waterways Corp.*, 319 U.S. 671 12

Interstate Commerce Commission v. *Mechling*, 330 U.S. 567 3

James McWilliams Blue Line, Inc. v. *Campbell's Creek R.R. Co.*, 278 I.C.C. 312 2

James McWilliams Blue Line, Inc. v. *U.S.*, 100 F. Supp. 66 2

Louisville & N.R. Co. v. *U.S.*, 282 U.S. 740 19

Mitchell v. *U.S.*, 313 U.S. 80 25

Morrell & Co. v. *N.Y.C. R.R. Co.*, 104 I.C.C. 104 9

National Spring & Wire Co. v. *Director General*, 60 I.C.C. 564 24

New Haven R.R. v. *I.C.C.*, 200 U.S. 361 19

St. Louis S.W. Ry. v. *U.S.*, 245 U.S. 136 15

United States v. *Trucking Co.*, 310 U. S. 349 24

Wight v. *U.S.*, 167 U.S. 512 ..... 12, 20

Statutes Cited

	Page
Interstate Commerce Act:	
Section 1	2, 4
Section 2	2, 4, 6
Section 3	2, 4, 6
Section 303(b)	16
Transportation Act of 1920, Section 500 (49 U.S.C. 142)	20
United States Code, Title 28, Section 2284	1